Lippincott IP

April 28, 2016

Honorable James B. Clark, III
United States Magistrate Judge
Martin Luther King Building & U.S. Courthouse
50 Walnut Street
Newark, New Jersey 07101

Re: Malibu Media v. Kapot Biswas
Case No. 2:15-cv-03937-KM-JBC
Proposed Joint Status Letter - May 4, 2016 Status Conference

Dear Judge Clark:

I represent Defendant Kapot Biswas. Kindly accept this Status Letter in advance of the status conference scheduled for May 4, 2016 at 10:30 AM.

THE PARTIES' CLAIMS

Plaintiff sues for infringement of its copyrighted works. Plaintiff alleges that, on April 14, 2015, Defendant used a peer-to-peer file distribution network to download and distribute over the public internet of all or part of certain digitally-rendered copyrighted works. Defendant denies downloading or distributing Plaintiff's copyrighted works. Defendant's several affirmative defenses include fair use, license, innocent intent, misuse of copyright and scenes à faire.

PROCEDURAL HISTORY

Plaintiff filed a complaint against a "John Doe" defendant (identified by an Internet Protocol address) on June 11, 2015 and was granted leave to subpoena subscriber information for a specific date from non-party Comcast Corp. on July 21, 2015. On about August 10, 2015 Defendant received a letter from Comcast notifying him of Comcast's intent answer the subpoena absent Defendant's timely opposition.

Plaintiff filed a Summons for an Amended Complaint with the Court on October 1, 2015 identifying a "John Doe" defendant. Plaintiff served Defendant with an Amended Complaint on October 9, 2015, identifying Defendant by his name. Defendant is unaware of an Order permitting Plaintiff to file an Amended Complaint or to designate Defendant by name.

Defendant filed his Answer on November 13, 2015. Abiding the Court's November 17, 2015 L.Civ.R. 16.1 preliminary scheduling Order, the parties filed a Joint Discovery Plan on December 22, 2015. The parties exchanged Interrogatories, Requests for Production, Requests to Admit and Initial Disclosures on December 30, 2015 in advance of the Court's February 4, 2016 Scheduling Conference and Order. The parties exchanged responses to one another's discovery requests on March 31, 2016. The Court then entered the parties' stipulated Discovery Confidentiality Order on April 4, 2016.

Plaintiff subpoenaed Apple, Inc. on February 29, 2016 seeking documents relating to service and maintenance of Defendant's computer. Apple, Inc. supplied documents in reply to Plaintiff's subpoena on March 15, 2016.

Against the Court's impending April 18, 2016 deadline (mandated by the February, 4, 2016 Scheduling Order) Plaintiff filed a motion to extend the time in which it may bring unresolved discovery disputes to the Court's attention. The Court, in an April 19, 2016 Memorandum Order, set a May 16, 2016 return of that motion. On April 26, 2016, Plaintiff filed a Motion for Leave to Serve a Non-Party Subpoena on Comcast, Inc. The Court set a return date of June 6, 2016 for the second motion, in an April 19, 2016 Memorandum Order. Both motions will be pending as of the May 4, 2016 Status Conference.

## FACTS AND CONTENTIONS INFLUENCING THE PARTIES' RESPECTIVE POSITIONS

Plaintiff regards Defendant as a "habitual and persistent and copyright infringer." Defendant's Fed.R.Civ.P.26(a) Initial Disclosures supplied Plaintiff with documents about Apple, Inc.'s maintenance and service of Defendant's computer. Defendant's computer and hard drive no longer is available for Plaintiff's inspection because Apple, Inc. exchanged it with Defendant for a new computer and hard drive. Plaintiff maintains that replacement of Defendant's malfunctioning computer constitutes proof of "spoliation of evidence" for which Defendant should in some fashion be penalized. Plaintiff asserts that replacement of Defendant's computer is proof that Defendant infringed all of Plaintiff's alleged copyrighted works.

Plaintiff maintains that Defendant's internet browsing history and adult media viewing habits (if any) in general constitute proof that Defendant infringed Plaintiff's copyrighted works on April 14, 2015 (the date of alleged infringement identified in the Amended Complaint). Plaintiff maintains that Defendant's alleged possession of one "bit hash" (a very small fraction) of one of Plaintiff's copyrighted works constitutes infringement of the entire work.

Plaintiff maintains that Defendant's possession of an alleged copyrighted work is actionable even if Defendant proves that Plaintiff has placed that work on the public internet freely for download and distribution. Plaintiff maintains that proof of infringement of one alleged copyrighted work on one date proves infringement of all alleged copyrighted works on all dates. Plaintiff maintains that Defendant's use (if any) of protective or anti-infiltration computer software constitutes proof of alleged infringement. Plaintiff maintains that Defendant's general knowledge and wherewithal regarding the use of computers and internet systems constitutes proof of alleged infringement.

Defendant maintains that Plaintiff is a "copyright troll" that has brought thousands of unwarranted lawsuits in order to wrest pre-litigation settlement payments from individuals who cannot afford the cost of litigation. Defendant maintains that Plaintiff employs the threat of embarrassment, public disclosure and potential criminal sanctions to achieve litigation advantage. Defendant maintains that the factual "expert" assertions in the Amended Complaint were created by a European entity to further the expert's business of marketing anti-piracy software of questionable efficacy and value.

Defendant maintains that he presented his malfunctioning computer to Apple, Inc. for repair before he knew about this action, that Apple, Inc. made several attempts to repair the computer, and that Apple, Inc. ultimately determined that the computer and its hard drive had to be replaced. Defendant maintains that he no longer has the computer or hard drive that he had on April 14, 2015 (the alleged date of infringement).

Defendant maintains that Plaintiff cannot establish infringement of a copyrighted work based on isolated "bit hashes" attributable to that work, where neither Plaintiff nor Defendant control the creation of modification of those "bit hashes." Defendant maintains that Plaintiff distributed its alleged copyrighted works in the public domain.

## DISCOVERY ISSUES AND DISPUTES

Plaintiff maintains that Defendant's interrogatory responses are insufficient because Defendant has not properly verified all the documents referred to in the responses. Plaintiff disputes the adequacy of Defendant's responses to interrogatories regarding router passwords, external "cloud"-based servers, internet browsing habits and the use of general categories of computer software.

Plaintiff cites the insufficiency of Defendant's document responses because Defendant has not supplied copies of his computer hard drive in a particular format designated by Plaintiff's expert. Plaintiff objects to Defendant's temporal limitation of his discovery responses to the specific date identified in the Amended Complaint.

Plaintiff seeks changes, amplifications or amendments to Defendant's responses to Plaintiff's Requests to Admit. Plaintiff asks Defendant to admit to the requests in their entirety, as worded, rather than supply partial admissions to some portions of the requests and denial of other portions of the requests.

Defendant maintains that Plaintiff is not entitled to discovery of Defendant's browsing habits and use of adult media in general because neither can lead to proof that

Defendant infringed the particular alleged copyrighted works on the specific date identified in the Amended Complaint. Defendant maintains that Plaintiff may not use the discovery process to extrapolate broad culpability from facts supporting or suggesting a single alleged infringement on a particular date.

Defendant maintains that he does not have the computer or hard drive that he used on the date identified in the Amended Complaint because the computer was exchanged with Apple, Inc. for a replacement. Defendant maintains that Apple. Inc.'s service personnel reformatted the computer's hard drive long before Defendant was served with the Amended Complaint or had other notice of Plaintiff's lawsuit. Defendant maintains that he cannot supply Plaintiff with a copy of the hard drive he used on the date alleged in the Amended Complaint, or of any backup, because neither that hard drive nor any backup exists.

Defendant maintains that no proof or testimony offered by Plaintiff's nominated expert should be allowed because that proof and testimony will amount to vague and unscientific speculation about manipulable binary data.

ISSUES TO WHICH THE PARTIES WISH
TO DRAW THE COURT'S ATTENTION

The following issues are brought to the Court's attention for address and potential resolution at the Status Conference.

- Must Defendant do more to supply information about the contents of a computer that is no longer in his possession.

- Should discovery be limited to the dates and allegedly infringed works for which the Amended Complaint provides factual support.

- By what process should expert witnesses be deposed.

- To what extent may the parties seek discovery of, and present at trial, facts regarding personal principles such as Defendant's alleged internet browsing habits or Plaintiff's alleged exploitation of underage models.

Given time constraints, the parties were not able to agree on language for a Joint Status Letter in advance of the Court's deadline. Defendant therefore respectfully submits this Status Letter on his own behalf. Attached to this letter is Defendant's proposed Joint Status Letter, as served to my office earlier today.

Respectfully submitted,

s/ Flann Lippincott
Flann Lippincott

cc: Patrick J. Cerillo, Esq.

# PATRICK J. CERILLO, LLC

## ATTORNEY AT LAW

PATRICK J. CERILLO*, Esq.
pjcerillolaw@comcast.net
*Qualified Family Mediator per R. 1:40

4 WALTER FORAN BLVD
SUITE 402
FLEMINGTON, NJ 08822
VOICE: (908) 284-0997
FAX: (908) 284-0915

BASKING RIDGE OFFICE
88 SOUTH FINLEY AVENUE
BASKING RIDGE, NJ 07920

**REPLY TO:**
FLEMINGTON OFFICE

April 28, 2016

**VIA ELECTRONIC FILING**
The Honorable Kevin McNulty
Courtroom PO 04
Martin Luther King Building & U.S. Courthouse
50 Walnut Street
Newark, NJ 07101

Re: Malibu Media v Kapot Biswas
Case No. 2:15-cv-03937-KM-JBC

Dear Judge McNulty:

Pursuant to this Court's Pretrial Scheduling Order [CM/ECF 23], the Parties hereby submit the following Joint Status Letter in preparation for the telephonic status conference currently scheduled for May 4, 2016 at 10:30 A.M.

**Plaintiff**

On December 30, 2015, Plaintiff served Defendant with its First Set of Interrogatories and Requests for Production (collectively referred to as "Plaintiff's Discovery"). However, since the Court rescheduled the Rule 16 Conference, Defendant requested (and received) additional time to respond to Plaintiff's Discovery. Defendant responded to Plaintiff's Discovery on March 31, 2016. On April 18, 2016, Plaintiff sent Defendant a detailed letter addressing numerous deficiencies in Defendant's Responses to Plaintiff's Discovery. Defendant has not yet provided Plaintiff with a suitable date and time to discuss the foregoing letter or any of the discovery deficiencies.

This letter and Defendant's responses to discovery are of the utmost importance because they relate to the spoliation of evidence. Indeed, various documents produced by Apple and Defendant indicate that Defendant returned his computer device to Apple *after* learning of this lawsuit, yet Defendant's responses to discovery purposefully avoid substantively responding to the requests seeking information about this destruction. Accordingly, at the upcoming conference, Plaintiff would like to discuss a deadline by which Defendant is required to respond substantively to Plaintiff's Discovery Letter. Additionally, Plaintiff would request that the Parties participate in a settlement conference in order to determine if resolution can be reached prior to spending additional time and cost.

**Defendant**

By: /s/ Patrick J. Cerillo
Patrick J. Cerillo, Esq.
4 Walter Foran Blvd., Ste. 402
Flemington, NJ 08822
Tel: (908) 284-0997
E-mail: pjcerillo@comcast.net
*Attorney for Plaintiff, Malibu Media, LLC*

By: /s/ Frances B. Lippincott, Esq.
Frances B. Lippincott, Esq.
475 Wall Street
Princeton, NJ 08540
Tel: (908) 237-0400
Email: flann@lippincottip.com
*Attorney for Defendant, Kapot Biswas*